

223574

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35147

**NORFOLK SOUTHERN RAILWAY COMPANY, PAN AM RAILWAYS INC., ET AL.
- JOINT CONTROL AND OPERATING/POOLING AGREEMENTS -
PAN AM SOUTHERN LLC**

**REQUEST FOR ORAL ARGUMENT OF THE COMMONWEALTH OF
MASSACHUSETTS EXECUTIVE OFFICE OF TRANSPORTATION AND PUBLIC
WORKS, U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC., AND NEW
ENGLAND SOUTHERN RAILROAD CO.**

EXPEDITED CONSIDERATION REQUESTED

**Jeffrey B. Mullan
Undersecretary and General Counsel
Executive Office of Transportation and Public Works
Ten Park Plaza
Boston, MA 02116-3969
(617) 973-7800
Counsel for the Commonwealth of Massachusetts
Executive Office of Transportation and Public Works**

**Vincent P Szeligo
Wick, Streiff, Meyer,
O'Boyle & Szeligo PC
1450 Two Chatham Center
Pittsburgh, PA 15219
(412) 765-1600
Counsel for the U.S Clay Producers
Traffic Association, Inc**

**Keith G. O'Brien
Robert A. Wimbish
Baker & Miller PLLC
2401 Pennsylvania Ave , NW, Ste. 300
Washington, D C. 20037
(202) 663-7820
Counsel for New England Southern Railroad Co.**

Dated: September 11, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35147

**NORFOLK SOUTHERN RAILWAY COMPANY, PAN AM RAILWAYS INC., *ET AL*
- JOINT CONTROL AND OPERATING/POOLING AGREEMENTS -
PAN AM SOUTHERN LLC**

**REQUEST FOR ORAL ARGUMENT OF THE COMMONWEALTH OF
MASSACHUSETTS EXECUTIVE OFFICE OF TRANSPORTATION AND PUBLIC
WORKS, U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC., AND NEW
ENGLAND SOUTHERN RAILROAD CO.**

EXPEDITED CONSIDERATION REQUESTED

In its decision in the above-captioned proceeding served on June 26, 2008 (the "June 26 Decision"), the Board accepted an Application¹ for a Transaction among Norfolk Southern Railway Company ("NS"), Pan Am Railways, Inc. ("PARI") (a noncarrier railroad holding company), and two of PARI's rail carrier subsidiaries, Boston and Maine Corporation ("B&M") and Springfield Terminal Railway Company ("Springfield Terminal"), pursuant to which – (1) NS and B&M would acquire joint control and ownership of Pan Am Southern LLC ("PAS"), a new rail carrier to be formed; and (2) Springfield Terminal would operate the lines of PAS and establish rates for PAS. In the June 26 Decision, the Board adopted an abbreviated procedural schedule to govern the proceeding,² under which interested parties were permitted a single

¹ The parties filing this request for oral argument hereby adopt and use the acronyms and abbreviations as contained in the Table of Abbreviations at pages vi-vii of the Application.

² The Board has accepted the Application as one for a "minor transaction" under its rules. By statute, the Board may provide for up to a 105-day procedural schedule for an application involving a minor transaction, with a final decision due no later than 45 days thereafter.

opportunity (on August 11, 2008) to submit comments and/or requests for conditions in response to the Application. The Board stated in that decision that it would determine at a later date whether or not to hold a public hearing or an oral argument.

For the reasons set forth below, the Executive Office of Transportation and Public Works ("EOTPW") (on behalf of the Massachusetts Bay Transportation Authority ("MBTA")³ and the Commonwealth of Massachusetts (the "Commonwealth")), U.S. Clay Producers Traffic Association, Inc. ("Clay Producers"), and New England Southern Railroad Company ("NES") (collectively, the "Joint Parties")⁴ hereby request that the Board schedule an oral argument in this proceeding to be held at the Board's offices by or before September 30, 2008.⁵ Because of the shortened procedural schedule currently in place, the Joint Parties urge expeditious Board action on their request, so that other interested parties who also may wish to participate in oral

49 U.S.C. 11325(d) and 49 CFR 1180.4(e)(2)-(3). In the subject proceeding, however, the Board has adopted a procedural schedule that would, in the absence of an oral argument, provide for the close of the record approximately 70 days after publication of the notice of acceptance of the Application in the Federal Register on June 27, 2008, with a final decision on October 20, 2008, roughly 115 days after the proceeding was initiated pursuant to the Federal Register notice. Thus, although the procedural schedule contemplates allowing the Board a full 45 days to render a final decision, it has adopted a procedural schedule for the development of the record that is roughly one-third shorter than is available under the statute. Considering the substantial interest generated in this proceeding and in light of the lack of consensus among the Board members over whether the proposed Transaction truly qualifies as a minor one, the Joint Parties question the Board's decision to adhere to an unnecessarily abbreviated process here.

³ For purposes of this proceeding, MBTA has authorized EOTPW to represent its position and interests. Accordingly, the Comments reflect the position of the Commonwealth generally, and of EOTPW and MBTA specifically.

⁴ In addition to the Joint Parties, the Committee for Better Rail Service in Maine has separately requested that the Board hold a public hearing in this proceeding.

⁵ In making this joint request, the Joint Parties wish to make clear that they are acting collectively solely for the purpose of demonstrating that the issues presented in the filings submitted to date in this proceeding warrant further evaluation by way of oral argument. Accordingly, the subject joint request is not, and should not be construed as, a collective effort regarding any substantive issue on the merits of the Application now before the Board.

argument may plan accordingly, and so that the issues presented at oral argument are given full consideration by the Board as it prepares its decision on the Application. In addition, the Montreal, Maine & Atlantic Railway, Limited ("MMA"), Milford-Bennington Railroad Company, Inc ("MBR"), Town of Ayer, Massachusetts ("Ayer"), and Town of Deerfield, Massachusetts ("Deerfield") have authorized the Joint Parties to inform the Board that they support the Joint Parties' request for oral argument

As the Board is aware, 30 interested parties, including the Joint Parties, have submitted comments in response to the Application.⁶ Most such comments expressed specific concerns regarding elements of the proposed Transaction, and many of those comments included requests for specific Board action to address or ameliorate such concerns. The Joint Parties understand that some interested parties have been, and may continue to be, exploring possible settlement arrangements with the Applicants that might in some cases obviate the need for certain ameliorative conditions from the Board. Such ongoing efforts would not be adequately reflected or accounted for in a record that is based upon a single round of comments filed some 70 days prior to the anticipated issuance of a final Board decision on the Application. In fact, the October 20 date that the Board has set for issuing a decision in this proceeding is in question, because the Board has not commented definitively on the level of environmental review, if any, to which the subject Transaction should be subjected.

In the Joint Parties' view, the issues before the Board in this proceeding have not been, and cannot be, fully addressed under a process that allows for only a single round of pleadings by interested parties. Moreover, given the significant number of parties that have come forward to express concern over what the Board had (largely on the basis of the Application alone) much

⁶ There are 44 entities registered as Parties of Record in this proceeding.

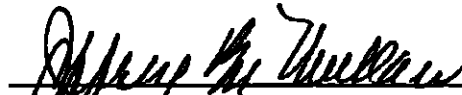
earlier estimated to be a “minor” Transaction, oral argument is especially important to ensure a full and complete evaluation of the issues at play here. As the Joint Parties understand it, the Board quite properly is accommodating of public expression of concerns and interests in proceedings under its jurisdiction. For this reason, the Joint Parties perceive that the Board is fully committed to holding public hearings and oral arguments where appropriate to foster useful dialogue among the Board members and the public in proceedings such as this one where significant policy and/or public interest issues have arisen.⁷ Moreover, even if the Board should conclude – contrary to the Joint Parties’ assertions here – that the issues before the Board have been addressed adequately in the pleadings of the parties despite the abbreviated procedural schedule, the Joint Parties respectfully submit that an oral argument nevertheless would be useful in illuminating the unresolved issues conveyed in the comments, and would assist the Board in arriving at a well-reasoned final decision in this proceeding.

For the foregoing reasons, the Joint Parties, as supported by MMA, MBR, Ayer, and Deerfield respectfully request expeditious Board action granting their request for an oral argument to be held in this proceeding by or before September 30, 2008, and further recommend that the Board revisit its procedural schedule and adjust it as appropriate to permit the Board to

⁷ See, e.g., Central Oregon & Pacific, Inc. – Abandonment and Discontinuance of Service – In Coos, Douglas, and Lane Counties, OR, STB Docket No. AB 515 (Sub-No. 2) (STB served Jul. 29, 2008) (Board scheduled a hearing in Oregon on the proposed abandonment of a rail line at the request of various elected officials, Lane County, and a shipper group); New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – In Wilmington and Woburn, MA, STB Finance Docket No. 34797 (STB served Mar. 29, 2007) (Board elected to hold an oral argument in connection with a controversial rail line construction petition that raised issues of the scope of the Board’s jurisdiction); Buckingham Branch Railroad Company – Lease – CSX Transportation, Inc., STB Finance Docket No. 34495 (STB served October 5, 2004) (Board granted the Brotherhood of Maintenance of Way Employees’ request for an oral argument to be scheduled in the subject railroad transaction, finding that oral argument would be “useful in illuminating [the] issues [in the proceeding], and [that oral argument] might assist the Board in arriving at a well reasoned decision”).

continue to have no less than 45 days following the conclusion of oral argument (and the close of the record) to prepare its final decision on the Application.

Respectfully submitted,



Jeffrey B. Mullan
Undersecretary and General Counsel
Executive Office of Transportation and Public Works
Ten Park Plaza
Boston, MA 02116-3969
(617) 973-7800
Counsel for the Commonwealth of Massachusetts
Executive Office of Transportation and Public Works

Vincent P. Szeligo
Wick, Streiff, Meyer,
O'Boyle & Szeligo PC
1450 Two Chatham Center
Pittsburgh, PA 15219
(412) 765-1600
Counsel for the U.S. Clay Producers
Traffic Association, Inc.

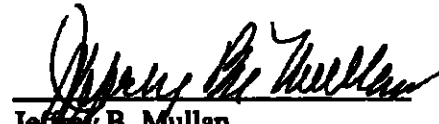
Keith G. O'Brien
Robert A. Wimbush
Baker & Miller PLLC
2401 Pennsylvania Ave., NW, Ste 300
Washington, D.C. 20037
(202) 663-7820
Counsel for New England Southern Railroad Co.

Dated: September 11, 2008

CERTIFICATE OF SERVICE

I have this day, on behalf of the aforementioned "Joint Parties," served a copy of the foregoing Request for Oral Argument upon all parties of record by depositing a copy in the U.S. mail in a properly-addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Dated September 11, 2008



Jeffrey B. Mullan
Undersecretary and General Counsel
Executive Office of Transportation and
Public Works